Supreme Court, U.S.
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No. 00-1916

In The

Supreme Court of the United States

TIMOTHY WALTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court lacks jurisdiction to grant the petition for writ of certiorari because the decision of the Tennessee Supreme Court is not a "final judgment" within the meaning of 28 U.S.C. § 1257.

II. Whether physical evidence discovered as a result of unwarned statements, voluntarily made during a custodial interrogation, must be suppressed as "fruit of the poisonous tree."

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STATEMENT OF JURISDICTION

The judgment of the Tennessee Supreme Court was entered on March 15, 2001. No petition for a rehearing was filed. Justice Stevens extended the time to file a petition for writ of certiorari up to and including July 13, 2001. The petition for a writ of certiorari was filed on July 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On May 22, 1997, three Dyer County, Tennessee, Sheriff's deputies and two federal postal inspectors went to petitioner's trailer because he was a suspect in connection with several burglaries of local post offices. The officers had received a tip from a man named Charles Thompson regarding petitioner's involvement. (App. 2, 4). The officers "secured the area" by going around to the back of the trailer, where they found marijuana plants and propane tanks. Petitioner denied possession of these objects, and he was never charged in connection with them. (App. 3). But, the officers asked petitioner if he would accompany them to the station to discuss the post office burglaries, and he agreed. (App. 3). He was handcuffed and put in an unmarked car. (App. 3). Petitioner

told the officers, "I know you. And I know the lies and things that [Charles Thompson] keep telling on me. And I've got some information where we can get him." (App. 4). The officer had never mentioned Charles Thompson's name, or the fact that it was Thompson who tipped the officers about the post office burglaries. (App. 4, n.1). Petitioner said Charles Thompson brought stolen goods to him and that he knew where they were hidden. The officer asked petitioner if he would take them to the goods, and he agreed. (App. 4).

Petitioner directed the officers where to go, taking them to several locations. He first directed them to a point along a public road, where a piece of plastic had been tied to a barbed wire fence. With his hands still cuffed in front of him, petitioner walked down a ravine and returned, carrying a plastic garbage bag containing a computer, a monitor, and a keyboard. (App. 4).

Petitioner told officers that he knew of additional stolen property and directed officers to his parents' house. There, he led them to a barn where, with handcuffs still on, he removed several floorboards. He uncovered a rifle wrapped in a pair of blue coveralls. (App. 5). The officer, recognizing the stolen rifle and knowing that it also had a scope, asked petitioner if there was any other piece to it; petitioner said there was and took them to his house, where the rifle's scope was hidden. (App. 5). Without further suggestion, petitioner also produced several electric heaters and a step ladder that police later determined were stolen from the Dyersburg Warehouse. (App. 5).

Petitioner was escorted to the police station where he was told for the first time of his rights to remain silent and to have an attorney present. (App. 6). Petitioner, despite his illiteracy, signed and dated an admonition and waiver of his *Miranda* rights. (App. 6). He then gave a statement detailing the activities of Charles Thompson and a Billy McNeely in obtaining this stolen property. (App. 6).

Petitioner was subsequently indicted by the Dyer County Grand Jury for one count of aggravated burglary, two counts of theft over $500, and one count of burglary. (App. 6). Petitioner filed a motion to suppress, in advance of trial, in which he claimed that his statements and any subsequently discovered evidence were secured in violation of *Miranda*. (App. 6). The trial court denied the motion, finding that although petitioner was in custody when he gave a statement, neither his statements nor the physical evidence was the product of interrogation. (App. 7).

On February 6, 1998, petitioner entered a conditional guilty plea to aggravated burglary and burglary, reserving a certified question of law regarding the trial court's denial of his motion to suppress.[1] (App. 7-8). The trial

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[1] Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure provides:

> An appeal lies from any order or judgment in a criminal proceeding where the law provides for such appeal, and from any judgment of conviction . . . upon a plea of guilty or nolo contendere if . . . (i) [d]efendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the

court then imposed concurrent sentences of four years and three years, respectively, to be served in the Tennessee Department of Correction. (App. 8).

The Tennessee Court of Criminal Appeals reversed the judgment, suppressed the evidence, and dismissed the charges. *State v. Timothy Walton*, Dyer County, C.C.A. No. 02C01-9807-CC-00210 (Tenn. Crim. App., filed April 23, 1999, at Jackson). (App. 8). The court found that

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> State and of the court the right to appeal a certified question of law that is dispositive of the case . . . or (iv) [d]efendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case.

In *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988), the Tennessee Supreme Court outlined the prerequisites to an appellate court's consideration of a certified question of law on its merits:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. . . . Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on the defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified.

petitioner's statements were not made with full knowledge of his rights and that the coercive nature of the arrest produced the incriminating information. (App. 8). The Tennessee Supreme Court granted the State's application for permission to appeal and reversed the Court of Criminal Appeals in part, finding that although the petitioner was in custody and subjected to interrogation, the physical evidence recovered by police as a result of petitioner's statements was admissible absent any evidence that the statements were the product of actual coercion. (App. 9).

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THE DECISION OF THE TENNESSEE SUPREME COURT IS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF 28 U.S.C. § 1257.

Petitioner pled guilty to aggravated burglary and burglary, reserving a certified question of law for appeal. (App. 8). The Tennessee Court of Criminal Appeals found petitioner's appeal meritorious and reversed his convictions. On appeal by the State of Tennessee, the Tennessee Supreme Court reversed the judgment of the Tennessee Court of Criminal Appeals in part and remanded the case to the trial court, giving petitioner the opportunity to withdraw his original plea and proceed to trial. (App. 42).

This Court has jurisdiction to review "final judgments by the highest court of a State" by way of certiorari, where, *inter alia*, "any title, right, privilege, or

immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S C. § 1257(a). The indispensable prerequisite for an exercise of this jurisdiction is a "final judgment by the highest court of a State." The decision below is not a final judgment within the meaning of § 1257.

Based on the judgment of the Tennessee Supreme Court (App. 52-53), petitioner has two options on remand to the trial court: he may withdraw his plea or elect not to do so. If petitioner chooses the former option, the issue presented in this petition may be litigated in the event of a final conviction, regardless of whether the Tennessee Supreme Court refuses to reconsider the federal issue on that appeal[2] and regardless of whether the Court designates its earlier ruling on this issue as the law of the case. *California v. Rooney*, 483 U.S. 307, 211-14 (1987); *Barclay v. Florida*, 463 U.S. 939 (1983). If petitioner is acquitted, the issue is moot.

Given the lack of a "final judgment" under 28 U.S.C. § 1257, this Court lacks jurisdiction to entertain the petition, and the petition should be dismissed on this ground alone. *See, e.g., Flynt v. Ohio*, 451 U.S. 619 (1981).

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[2] *Mercer v. Theriot*, 377 U.S. 152, 153 (1964); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973).

II. PHYSICAL EVIDENCE DISCOVERED AS A RESULT OF UNWARNED STATEMENTS, VOLUNTARILY MADE DURING CUSTODIAL INTERROGATION, NEED NOT BE SUPPRESSED AS "FRUIT OF THE POISONOUS TREE."

A. The Tennessee Supreme Court has not decided an important federal question that has not been settled by this Court or in a way that conflicts with relevant decisions of this Court.

In holding that non-testimonial evidence discovered as a result of a constitutionally prohibited custodial interrogation should not be excluded as "fruit of the poisonous tree," the Tennessee Supreme Court did not decide an important question of federal law that has not been, but should be settled by this Court, or decide an important question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(b). Indeed, the decision below is consistent with this Court's decisions in *Oregon v. Elstad*, 470 U.S. 298 (1985), *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Dickerson v. United States*, 530 U.S. 428 (2000). Therefore, the decision furnishes no basis for review.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege against self-incrimination "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976) (emphasis in original). This privilege ordinarily does not apply to non-

testimonial evidence. *See, e.g., Schmerber v. California*, 384 U.S. 757, 764 (1966) (suspect may be compelled to supply incriminating blood samples).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court concluded that statements made while in custody are presumptively coerced, regardless of actual coercion by police, given the nature of custodial interrogation, which isolates and pressures the suspect. *Id.* at 455. Therefore, the Court created "concrete constitutional guidelines for law enforcement agencies and courts to follow."[3] *Id.* at 442.

And in *Oregon v. Elstad*, this Court noted that the *Miranda* exclusionary rule "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." 470 U.S. at 306. In other words, the failure to administer *Miranda* warnings creates a presumption of compulsion, and though an unwarned statement may be voluntary within the meaning of the Fifth Amendment, it must be excluded from evidence under *Miranda*. *Id.* at 307.

But, the Court further distinguished *Miranda* violations from violations of the Fourth Amendment, which have traditionally resulted in the suppression of evidence and witnesses discovered as a result as "fruit of the

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[3] The warnings police are required to give are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

poisonous tree." *Id.* at 305-06 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). The goal of the Fourth Amendment's exclusionary rule is to deter unlawful police conduct; however, the goal of the Fifth Amendment's exclusionary rule is to assure trustworthy evidence. *See United States v. Washington*, 431 U.S. 181, 187-88 (1977); *Michigan v. Tucker*, 417 U.S. at 448.

In *Elstad*, the Court granted certiorari to decide whether "the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." 470 U.S. at 303. In that case, the defendant was a burglary suspect, and the police came to his house with an arrest warrant. The defendant made an incriminating statement to police prior to being given *Miranda* warnings. After the defendant was taken to the police headquarters, he was advised of his *Miranda* rights. He then gave the police a written statement detailing his participation in the burglary. *Id.* at 299.

Citing *Wong Sun v. United States, supra*, the defendant moved to suppress both his statement given prior to the *Miranda* warnings and his confession, claiming that the subsequent confession was tainted by the failure to advise him of his *Miranda* rights before his first statement and thus was "fruit of the poisonous tree."

The Court, however, reaffirmed that the "prophylactic" *Miranda* warnings were not directly compelled by the Constitution, but instead served to insure that the defendant's right against compelled self-incrimination was

protected. 470 U.S. at 305 (quoting *New York v. Quarles*, 467 U.S. 649, 654 (1984)). The *Elstad* Court noted that "admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.* (quoting *United States v. Washington*, *supra*, 431 U.S. at 187).

The *Elstad* Court cited two cases for the proposition that a failure to administer *Miranda* warnings does not automatically require suppression of the "fruits" of the unwarned statement. In *Harris v. New York*, 401 U.S. 222 (1971), the Court ruled that, although the "presumption of coercion" created by a *Miranda* violation required the exclusion of otherwise voluntary statements taken in violation of *Miranda* from use in the Government's case in chief, it did not bar their use for impeachment purposes on cross-examination. *Elstad*, 470 U.S. at 307 (citing *Harris*, 401 U.S. at 224-225). The *Elstad* Court pointed out that where statements are preserved for use in situations that fall outside the sweep of the *Miranda* presumption, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test." *Id.* at 307, 308 (quoting Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1981)).

The *Elstad* Court also relied on *Michigan v. Tucker*, 417 U.S. 433 (1974). *Tucker* held that, where the testimony of a third party witness was discovered as a result of a statement taken from the accused without the full benefit of *Miranda* warnings, the unwarned confession must be suppressed, but the third party witness's testimony did not. The *Elstad* Court explained that, because the statement in *Tucker* did not involve actual compulsion, the unwarned

questioning did not abridge the defendant's constitutional privilege but rather departed from the prophylactic standards of *Miranda*. 470 U.S. at 308. The Court recognized that where there is no actual infringement of a defendant's constitutional rights, the doctrine expressed in *Wong Sun*, that fruits of a constitutional violation must be suppressed, did not control. *Id.*

Petitioner argues that this Court's recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000), changes the scope of *Miranda* and elevates those warnings to the level of a constitutional right equal to the Fifth Amendment, or any other constitutional right for that matter. However, the very language of *Dickerson* counsels otherwise. In *Dickerson*, this Court determined that 18 U.S.C. § 3501, enacted by Congress in the wake of *Miranda*, supplied insufficient protections to ensure that an accused was informed of his right to remain silent and to assure him that the exercise of that right would be honored. 530 U.S. at 442-43. In so doing, this Court held that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves." *Id.* at 432.

The Fourth Circuit Court of Appeals in *Dickerson* had found that since *Miranda* was not a constitutional holding, Congress could by statute have the final say on the question of admissibility. *Id.* The Court of Appeals relied in part on a statement by this Court in *Miranda* that the decision in no way created a "constitutional straightjacket." *Dickerson*, 530 U.S. at 440 n.6 (quoting *Miranda*, 384 U.S. at 467). In response to that argument, this Court noted that "a review of our opinion in *Miranda* clarifies that this disclaimer was intended to indicate that the

Constitution does not require police to administer the particular *Miranda* warnings, not that the Constitution does not require a procedure that is effective in securing Fifth Amendment rights." *Id.*

The Court then reaffirmed its holding in *Elstad*. "Our decision in that case – refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases – does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Id.* at 441.

Rather than breaking new constitutional ground, this Court in *Dickerson* merely reaffirmed the principles of *Miranda* and its progeny in *Tucker* and *Elstad*. In fact, in the face of the dissent's challenge that to hold § 3501 unconstitutional the Court would have to conclude that *Miranda* warnings are required by the Constitution, this Court commented that it "need not go farther than *Miranda* to decide this case." 530 U.S. at 442. The Court clearly limited its holding to the fact that the "totality of the circumstances" test, which was rejected by *Miranda* and utilized in § 3501, was insufficient to protect the rights guaranteed by the Fifth Amendment.

This is precisely the conclusion reached by the Tennessee Supreme Court. "[T]he majority [in *Dickerson*] also limited its decision to holding that the 'totality of the circumstances' test, without more, is inadequate to protect the privilege against self-incrimination. Indeed, when read in this context, *Dickerson* practically does little more

than did *Miranda* itself, which, in holding that the 'totality of the circumstances' test was insufficient to safeguard Fifth Amendment protections, was clear that the constitution did not require any particular set of procedures." (App. 27). Therefore, consistent with this Court's decisions, the Tennessee Supreme Court properly concluded that "a defendant may seek suppression of nontestimonial evidence discovered through his or her unwarned statements only when the statements are the product of an actual violation of the privilege against self-incrimination, *i.e.*, such as when actual coercion in obtaining the statement is involved or when the invocation of the right to remain silent or to have counsel present is not 'scrupulously honored.' " (App. 33).

Dickerson has not changed the landscape established in *Miranda* and its progeny. "[M]erely recognizing that *Miranda* is a decision of constitutional law does not mean that a violation of the particular procedures set forth in that decision must also be a violation of the constitution itself." (App. 28).

B. The Tennessee Supreme Court has not decided the question in a way that conflicts with the decision of a United States Court of Appeals or the decision of a state court of last resort.

The Tennessee Supreme Court's decision does not conflict with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10(b). In fact, the Tennessee Supreme Court's decision in this case is consistent with the decisions of all courts of appeal that have addressed the issue, and the two state

cases relied on by the petitioner are factually and legally distinguishable.

The United States Court of Appeals for the Sixth Circuit, in addressing the question of whether non-testimonial evidence proximately derived from a *Miranda* violation must be suppressed as "fruit of the poisonous tree," held that "where police simply fail to administer *Miranda* warnings, the admissibility of non-testimonial physical evidence derived from the uncounselled statements should turn on whether the statements were voluntary within the meaning of the fifth amendment." *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1518 (6th Cir. 1988). In that case, the court held that the cocaine found in the defendant's truck was admissible despite the fact that it was located pursuant to a statement taken from the defendant in violation of *Miranda*. The court found that, although the defendant was interrogated about the existence and whereabouts of his truck, the defendant's statements appeared to be voluntary and there was no element of coercion present. Therefore, there was little reason for "highly probative evidence . . . to be irretrievably lost to the factfinder . . . ," and the cocaine found in the truck was held to be admissible. *Id.* at 1518, 1519.

The *Sangineto-Miranda* court reached its conclusion by following the reasoning set forth by this Court in *Oregon v. Elstad, supra*. 859 F.2d at 1516-19. The *Sangineto-Miranda* court also noted two policy reasons for such evidence to be admissible. The court found that although the admission of non-testimonial physical evidence derived from a *Miranda* violation may "marginally reduce

the incentives to administer *Miranda's* prophylactic warnings . . . the arguable benefits from excluding such evidence by way of possibly deterring police conduct that might compel admissions . . . are far outweighed by the advantages of having relevant and probative evidence, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth." *Id.* at 1518. In addition, the court found that *Miranda* warnings need only be given after a suspect has been placed in "custody" or had his freedom significantly restricted. Because law enforcement officials will have difficulty defining "custody" for purposes of administering *Miranda*, they cannot be expected to act without error. *Id.* at 1518. "If errors are made by law enforcement officers in administering *Miranda* procedures, they should not breed the same irremedial consequences as police infringement of the Fifth Amendment itself." *Id.* at 1518 (quoting *Oregon v. Elstad*, 470 U.S. at 309 (1985)). Therefore, "where police simply fail to administer *Miranda* warnings, the admissibility of non-testimonial physical evidence derived from the uncounselled statements should turn on whether the statements were voluntary within the meaning of the fifth amendment." *Id.* at 1518.

Other federal circuits have reached the same conclusion.[4] The Fourth Circuit has held that the "fruit of the

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[4] All of the circuit court of appeals' cases cited by petitioner are consistent with the Tennessee Supreme Court's decision. He cites to two district court cases in support of his position, but those cases are insufficient under Rule 10(b) to support a grant of the writ.

poisonous tree" doctrine does not apply to physical evidence discovered as the result of a statement obtained in violation of *Miranda* because the failure to deliver *Miranda* warnings is not in itself a constitutional violation. *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997). In that case, the defendant, suspected of possessing weapons, was arrested pursuant to an arrest warrant and was asked, prior to receiving any *Miranda* warnings, if he had any guns in his hotel room. He told the officers he did and agreed to allow them to secure and inventory his property. During the search of his room the defendant volunteered more information to the officers. The officers recovered several firearms from the defendant's room. *Id.* at 1137. The trial court suppressed the tangible evidence, including the firearms, finding them to be "fruit of the poisonous tree." The circuit court reversed, finding that this Court had declined to extend the "tainted fruits" doctrine to *Miranda* violations in both *Tucker* and *Elstad*, because there was no constitutional violation. *Id.* at 1141. Thus, the *Elie* court concluded that the "failure to deliver *Miranda* warnings is not itself a constitutional violation. As a result, we hold that *Wong Sun* and its 'fruit of the poisonous tree' analysis is inapplicable in cases involving mere departures from *Miranda*. Accordingly, derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree.' " *Id.* at 1146.

Similarly, the First Circuit recognized that the *Elstad* Court "flatly forbade automatic application of the fruits doctrine for *Miranda* violations," and that *Elstad* should not be confined to technical *Miranda* violations given the language "emphasizing the voluntariness test as the

prime safeguard." *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998). In *Byram*, the defendant was arrested on a parole violation and while incarcerated gave an unwarned statement about possessing a weapon used in a shooting. At that time, the officer assured the defendant that he was not a suspect in the shooting, when in fact he was facing a possible possession charge. The defendant subsequently testified at a state trial about his statement, again without any *Miranda* warning, and was eventually charged with possession of a weapon. *Id.* at 406, 407. The court found that both statements should be suppressed because the *Miranda* violation was not merely technical but instead was obtained after the defendant was assured that he was not a suspect, there was a substantial nexus between the violation and the second statement, and the second statement was not preceded by an adequate *Miranda* warning. The court noted that these facts stood in contrast to the facts of *Elstad* and concluded that "the Supreme Court was not laying down an iron rule debarring a 'fruits' argument in all *Miranda* cases." Therefore, while acknowledging that *Elstad* "discourages any promiscuous use of the fruits doctrine in ordinary *Miranda* cases," the court concluded that the statements should be suppressed due to the "unusual" facts of the case. *Id.* at 410.

In *United States v. Cherry*, 794 F.2d 201 (5th Cir. 1986), the Fifth Circuit upheld the admissibility of a murder weapon located as a result of a statement obtained in violation of *Miranda*. The court found that *Elstad* established that *Miranda* violations are not always Fifth Amendment violations and do not automatically establish the inadmissibility of evidence obtained. Under *Elstad*,

the test to be applied to evaluate whether a defendant's Fifth Amendment right against compelled testimony has been violated is the "due process voluntariness test." *Id.* at 207. Applying that test, the court found that the defendant's statement concerning the whereabouts of the murder weapon was voluntary and therefore the weapon was admissible. Other federal court decisions have supported this position. *See United States v. Crowder*, 62 F.2d 782 (6th Cir. 1995) (non-testimonial physical evidence, such as a shotgun, discovered due to an unwarned statement is admissible where the unwarned statement is voluntary); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990) (non-testimonial physical evidence, such as a deportation record, obtained as a result of a *Miranda* violation is admissible where the unwarned statement was voluntary); *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988) (non-testimonial evidence, such as a bus ticket and baggage claim stub, can be excluded as fruit of the poisonous tree only when an actual constitutional violation occurs).

Only a few state courts of last resort have addressed this issue, and those cited favorably by the petitioner are both legally and factually distinguishable.[5] The Colorado Supreme Court held that, under the Colorado Constitution, "once a court determines that the statement was improperly obtained in violation of *Miranda*, any statements and real evidence subsequently acquired may be

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[5] The petitioner cites to two cases, *State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1999), and *State v. C.F.*, 2001 WL 527682 (Fla. App. 4 Dist.), which are not decisions from state courts of last resort.

suppressible as the fruit of the illegal interrogation." *People v. Breidenbach*, 875 P.2d 879, 889 (Colo. 1994) (citing *People v. Briggs*, 709 P.2d 911, 915-16 (Colo. 1985), which recognizes that it is a longstanding principle in Colorado that article II, section 18 of the Colorado constitution "was not intended merely to protect a party from being compelled to make confessions of guilt, but protects him from being compelled to furnish a single link in a chain of evidence by which his conviction of a criminal offense might be secured."). Thus, *Breidenbach* rests upon state, not federal, constitutional grounds.

In *State v. Miller*, the Oregon Supreme Court concluded that evidence secured after the defendant gave an unwarned statement must be suppressed, not because it derived from a *Miranda* violation, but because it was discovered in violation of the defendant's Fifth Amendment rights. 709 P.2d 225, 241 (Or. 1985). There, the defendant asserted his right to counsel after he was in custody, but police continued to interrogate him in violation of that right. It is well-established that if an accused requests counsel during a custodial interrogation, all questioning must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S. 477 (1981).

The Wisconsin Supreme Court held that police-initiated interrogation conducted after a suspect unambiguously invoked the right to have counsel present during questioning was a constitutional violation. This violation triggered the fruit of the poisonous tree doctrine, requiring the suppression of the fruits of that constitutional violation. *State v. Harris*, 544 N.W.2d 545 (Wis.

1996). However, the *Harris* court was careful to distinguish that type of violation from a *Miranda* warning violation, noting that "there is a critical difference between a mere defect in the administration of *Miranda* warnings 'without more' and police-initiated interrogation conducted after a suspect . . . invokes the right to have counsel present. . . . We agree with the Court in *Elstad* that the analysis employed therein is 'inapposite' once the right to silence or counsel has been asserted, and we decline to extend *Elstad* to cover evidence obtained in violation of *Edwards*." *Id.* at 553, 554.

Other state supreme courts have declined to admit such evidence, finding that to do so would impermissibly reduce the deterrent effect on *Miranda* violations. *See State v. Preston*, 411 A.2d 402 (Me. 1980) (application of the police-deterrence rationale requires exclusion of mattress obtained as a result of a *Miranda* violation); *State v. Gravel*, 601 A.2d 678 (N.H. 1991) (statements obtained in violation of *Miranda* may not be relied upon to establish probable cause for issuance of a search warrant). However, these decisions carry little, if any, weight. *Preston* was decided five years before *Elstad*, and *Gravel* is distinguishable on state constitutional grounds. 601 A.2d at 685.

Finally, some state supreme courts have simply held that the Fifth Amendment privilege against self-incrimination does not extend to non-testimonial physical evidence, but rather is limited to testimonial evidence only. *See State v. Rauhauser*, 272 N.W.2d 432 (Ia. 1978); *State v. Fasching*, 453 N.W.2d 761 (N.D. 1990).

In the present case, the defendant, after volunteering that Thompson had stolen and hidden several items, offered to tell the officers where to find the property. The defendant provided directions to a location where he was allowed to walk into a ravine and take possession of a computer monitor, keyboard and computer. The defendant directed the officers to his parents' home where a rifle had been hidden. The defendant then showed the officers where the scope to the rifle was located at his residence, along with a stolen electric heater and step-ladder. (App. 3-4).

Though the statements of petitioner concerning Charles Thompson and the directions he provided were taken in violation of *Miranda*, petitioner's statements and actions in leading the officers to the stolen items were entirely voluntary. The officers never undertook an interrogation of petitioner or pressured him in any way. Petitioner initiated the conversation and provided the information on his own without any inquisition by the officers. Under this Court's decisions in *Tucker*, *Elstad*, and *Dickerson*, and the rationale of the courts of appeal in *Sangineto-Miranda*, *Elie*, *Cherry*, *Crowder*, *Gonzalez-Sandoval* and *Bengivenga*, and because petitioner's statements were voluntary and were not the result of any coercion, the stolen items found as a result of the volunteered statements are admissible regardless of any *Miranda* violation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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